No. 97-704

In The

Supreme Court of the United States

October Term, 1997

PHILOMENA DOOLEY, et al.,

Petitioners,

v.

KOREAN AIR LINES CO., LTD.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

PETITIONERS' BRIEF ON THE MERITS

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60 pp

QUESTION PRESENTED

Does the Death on the High Seas Act (DOHSA) pre-empt an otherwise valid survival cause of action under general maritime law for the personal injuries sustained by a decedent prior to his/her death?

LIST OF PARTIES IN THE PROCEEDING BELOW

A. PETITIONERS

Petitioners are Philomena Dooley, Personal Representative of the Estate of Cecelio Chuapoco; Carl Cole, Personal Representative of the Estate of Woon Kwang Siow; and Kimberly S. Saavedra, Personal Representative of the Estate of Jan Hjalmarrson.

B. RESPONDENT

Respondent Korean Air Lines Co., Ltd. is a member of the Hanjin Group of Korea, which comprises companies under common management direction. The 23 affiliated companies of the Hanjin Group are:

Hanjin Transportation Co., Ltd.
Hanil Development Co., Ltd.
Hanjin Shipping Co., Ltd.
Jungsuck Enterprise Co., Ltd.
Korea Air Terminal Service Co., Ltd.
Air Korea Co., Ltd.
Jedong Industries, Ltd.
Hanjin Travel Service Co., Ltd.
Hanjin Construction Co., Ltd.
Korea Freight Transportation Co., Ltd.
Hanjin Data Communications Co., Ltd.
Hanil Leisure Co., Ltd.
Hanjin Information Systems & Telecommunications Co., Ltd.
Pyung Hae Mining Development Co., Ltd.
Cheju Mineral Water Co., Ltd.
Union Express, Ltd.
Hanjin Heavy Industries Co., Ltd.
Femtco Shipping Co., Ltd.

LIST OF PARTIES IN THE PROCEEDING BELOW – Continued

Oriental Fire & Marine Insurance Co., Ltd.
Korean French Banking Corporation-SOGEKO
Hanjin Investment & Securities Co., Ltd.
Inha University Foundation
Jungsuck Foundation

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is reported as *Dooley v. Korean Air Lines Co., Ltd. (In re Korean Air Lines Disaster of Sept. 1, 1983)*, 117 F.3d 1477 (D.C. Cir. 1997) and appears in the Joint Appendix at 93-110.

The memorandum order for the United States District Court for the District of Columbia granting Korean Air Lines' Motion for Partial Summary Judgment is reported as *In re Korean Air Lines Disaster of Sept. 1, 1983*, 935 F. Supp. 10 (D.D.C. 1996) and appears in the Joint Appendix at 77-92.

JURISDICTION

On December 5, 1983, Philomena Dooley, as the Personal Representative of the Estate of Cecelio Chuapoco, deceased, brought suit against Respondent in the United States District Court for the District of Columbia and later amended the complaint on January 24, 1984. J.A.[1] 12-30. On June 6, 1984, Mary Dee Martouche,[2] as the Personal Representative of the Estate of Woon Kwang Siow, deceased, brought suit against Respondent in the United States District Court for the District of Columbia. J.A. 64-91. On October 4, 1983, Kimberly S. Saavedra, as

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[1] Documents contained in the Joint Appendix are designated "J.A." and the page number. Documents contained in the Appendix to the Brief on the Merits are designated "App." and the page number.

[2] Carl M. Cole was subsequently substituted as the Personal Representative of the Estate of Woon Kwang Siow.

the Personal Representative of the Estate of Jan Hjalmarrson, brought suit against Respondent in the United States District Court for the District of Columbia, and later amended the complaint on September 26, 1985. J.A. 39-50.

On June 4, 1996, the District Court granted Respondent's Motion for Partial Summary Judgment. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 935 F. Supp. 10 (D.D.C. 1996). J.A. 77-92. On July 1, 1996, the District Court certified the decision for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The petition for permission to pursue the interlocutory appeal was granted by the District of Columbia Circuit on August 15, 1996. On July 11, 1997, the District of Columbia Circuit issued their opinion and judgment affirming the District Court. *Dooley v. Korean Air Lines Co., Ltd.*, 117 F.3d 1477 (D.C. Cir. 1997). J.A. 93-110. Petitioners timely filed a Petition for Rehearing and Suggestion for Rehearing *en banc* to the District of Columbia Circuit which were denied on August 28, 1997. J.A. 111-112.

The jurisdiction of this Court to review the judgment of the District of Columbia Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND TREATY PROVISIONS AT ISSUE

Pertinent provisions of the Death on the High Seas Act (DOHSA), 46 U.S.C. § 761-768 (1988 ed.) are reprinted in the Appendix to this Brief on the Merits at 2a-4a.

Pertinent provisions of the Warsaw Convention, *Convention for the Unification of Certain Rules Relating to International Transportation by Air*, October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), reprinted in note following 49 U.S.C. § 1502 (1988 ed.), are reprinted in the Appendix to the Brief on the Merits at 1a.

STATEMENT OF THE CASE

On September 1, 1983, decedents Cecelio Chuapoco, Jan Hjalmarrson, and Woon Kwang Siow were passengers on board Korean Air Lines' Flight KE007 enroute from New York City, New York to Seoul, South Korea. They were killed when their aircraft was shot down after it had invaded airspace of the former Soviet Union for several hours. All occupants of the Boeing 747 aircraft were killed when the aircraft ultimately crashed into the Sea of Japan approximately 12 minutes after damage was incurred. The passengers were all traveling on tickets such that the resulting claims were governed by the Warsaw Convention. The respective personal representative of each decedent's estate filed a Complaint which included a separate survival cause of action on behalf of the estate of each decedent for the decedent's pre-death pain and suffering and a wrongful death cause of action brought by the personal representatives in his/her fiduciary capacity.[3] The Complaints were filed in the United States District Court for the District of Columbia against Respondent, Korean Air Lines Co., Ltd. ("KAL"), and against various other defendants, all of whom except KAL were dismissed before the trial.

[3] DOHSA requires suit be brought by the personal representative of the estate of a decedent. *See*, 46 U.S.C. § 762.

In 1989, a jury found that KAL had committed "wilful misconduct" such that the Warsaw limitations on damages were inapplicable. That finding was upheld on appeal, although the Court of Appeals also vacated an award of punitive damages. *See generally, In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991); *Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217 (1996). Because the Treaty requires a finding of "wilful misconduct" in order to deny the airline its per-passenger monetary limitation on damages (*see*, Article 25, App. 1a), the basis of liability at the trial was "wilful misconduct" rather than unseaworthiness or any other common law tort or maritime tort concept. After liability was resolved, the District Court remanded all of the actions that had not originally been filed in the District of Columbia to the originating courts and proceeded with motions practice on damages issues for the approximately 24 claims that remained in the District of Columbia.

In a pretrial motion, KAL requested the District Court to rule that DOHSA alone governed the claims and to dismiss all claims for non-pecuniary damages, including the estates' survival causes of action. The District Court denied the motion on the grounds that the Warsaw Convention and DOHSA were both implicated in the cases and that Article 17 of the Warsaw Convention permitted recovery for "damage sustained." *In re Korean Air Lines Disaster of Sept. 1, 1983*, Nos. 83-3587, *et al.* memo. op. at 2 (D.C. April 8, 1993). J.A. 58-63.

Several damages cases were tried in the District Court during 1993, each of which included survival

action claims for the decedents' pre-death pain and suffering for which verdicts were rendered. Each jury verdict was appealed to the District of Columbia Circuit. In **none** of the appeals in which survival action damages were awarded did KAL challenge the legal availability of a survival action recovery for pre-death pain and suffering although it did appeal the legal sufficiency of the evidence to support the verdicts. *Forman v. Korean Air Lines, Co., Ltd.*, 84 F.3d 446 (D.C. Cir.), *cert. denied*, 117 S.Ct. 582 (1996); *Oldham v. Korean Air Lines, Co., Ltd.*, 127 F.3d 43 (D.C. Cir. 1997), *cert. pending*, Docket No. 97-1180. Respondents' claims, however, were still pending trial when this Court decided *Zicherman, supra.*

Zicherman arose from the same air crash disaster that underlies Petitioners' claims, but it had proceeded to trial in the Southern District of New York and through the appellate process in the Second Circuit. This Court granted *certiorari* on the sole issue whether loss of society damages were available in a wrongful death action governed by the Warsaw Convention where the death occurred on the high seas.

Zicherman held that Article 17 of the Warsaw Convention was merely a pass-through and that whatever damages law would ordinarily be applied under the forum's choice-of-law rules should be applied in Warsaw-governed cases. *Id.* 516 U.S. at 228-229. For deaths that occur on the high seas, DOHSA is the source of wrongful death remedies for claims filed in the United States. *Zicherman* explicitly did not address the separate and independent survival cause of action created under general maritime law for pre-death pain and suffering. *Id.* 516 U.S at 230 n.4.

Following *Zicherman*, three Federal Circuit Courts addressed damages issues arising from the KAL catastrophe. *Bickel v. Korean Air Lines, Co., Ltd.*, 83 F.3d 127 (6th Cir. 1996), *amended on reh'g* 96 F.3d 151, *cert. denied* 117 S.Ct. 770 (1996); *Saavedra v. Korean Air Lines, Co., Ltd.*, 93 F.3d 547 (9th Cir.), *cert. denied*, 117 S.Ct. 584 (1996); *Forman, supra; Oldham, supra.*

In *Bickel, supra*, the Sixth Circuit originally held that there was no right to recover for pre-death pain and suffering. In an amended decision, however, it held that KAL had not properly preserved the issue on appeal by failing to raise it in its initial briefs. The Circuit denied KAL's challenge to the sufficiency of the evidence to sustain the verdicts for pre-death pain and suffering, finding that the factual circumstances on board KE007 justified an award of damages. *Bickel, supra*, 96 F.3d at 155-156. Similarly, in *Forman, supra*, and *Oldham, supra*, the D.C. Circuit held that KAL had not preserved its right to challenge the legal availability of the survival action award as it had not been raised in its initial briefs. The District of Columbia Circuit also affirmed the sufficiency of the evidence to sustain the verdicts for pre-death pain and suffering. *Forman, supra*, 84 F.3d at 448-449; *Oldham, supra*, 127 F.3d at 56-57.

In *Saavedra, supra*, however, the Ninth Circuit permitted KAL to overcome its procedural deficiencies and substantively addressed the issue. The Ninth Circuit relied heavily on *Zicherman* and *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978) and read them to mean that DOHSA expressed Congress' intent to preclude all non-pecuniary damages and that the preclusion could not be circumvented by use of a general maritime law survival action

containing non-pecuniary remedies. *Saavedra, supra*, 93 F.3d at 553-54.

Petitioners' claims remained stayed in the District Court while the appellate process was proceeding in the other KAL cases. After *Zicherman*, KAL moved in the District Court to dismiss all claims for non-pecuniary damages in the cases still awaiting trial. J.A. 6, Docket Entry 2/26/96. Since the passengers' injuries occurred during the approximate 12 minute descent, the only non-pecuniary claim in the survival action was for physical and mental pre-death pain and suffering. The District Court granted the Motion. J.A. 6, Docket Entry 6/4/96. Under the direction of *Zicherman*, the District Court proceeded with a choice-of-law analysis and concluded that United States' law should be applied and that DOHSA was the applicable wrongful death law. It disallowed a general maritime law survival cause of action for damages for pre-death pain and suffering on the grounds that *Zicherman* held that DOHSA provided the exclusive remedy for damages and that DOHSA's remedies could not be supplemented with general maritime principles. The District Court certified its decision for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and the District of Columbia Circuit accepted the appeal.

The D.C. Circuit first acknowledged that this Court has thus far declined to identify a general maritime law survival cause of action akin to the wrongful death cause of action defined in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), but noted that a majority of Courts of Appeals had recognized such general maritime law survival actions for pre-death pain and suffering. *Dooley, supra*, 117 F.3d at 1480-1481. The Court of Appeals also

noted that the First and Fifth Circuits had permitted general maritime law survival actions in cases in which the wrongful death action was governed by DOHSA [*citing Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890 (5th Cir. 1984); *Barbe v. Drummond*, 507 F.2d 794 (1st Cir. 1974)], although the Ninth Circuit had reached the opposite conclusion (*citing Saavedra, supra*). *Id.* The D.C. Court of Appeals chose to align itself with the Ninth Circuit.

The D.C. Circuit then assumed *arguendo* that general maritime law provides a survival cause of action. However, it held that DOHSA preempted such general maritime law inasmuch as Congress had legislated its judgment as to proper recoveries for deaths on the high seas and that those recoveries were limited to DOHSA damages. According to the D.C. Circuit, Congress had restricted the beneficiary class and recoverable damages for any and all of the surrounding circumstances that result in a death on the high seas to those contained in DOHSA. *Dooley, supra*, 117 F.3d at 1481-1483. Thus, it denied survival action damages for pre-death pain and suffering and, by necessary implication, any other survivor claims, no matter what the extent or duration of the injury.

During the pendency of Petitioners' Petition for Writ of *Certiorari* to this Court, the Eleventh Circuit decided *Gray v. Lockheed Aeronautical Sys. Co.*, 125 F.3d 1371 (11th Cir. 1997). *Gray* explicitly rejected the reasoning of the Court below and of the Ninth Circuit in *Saavedra, supra*. While acknowledging that DOHSA is the exclusive source of recovery for a *wrongful death* on the high seas, the Eleventh Circuit, after a searching analysis of the

legislative history and the plain meaning of the words of DOHSA, concluded that Congress did not speak to survival action issues in DOHSA. It further concluded that a general maritime survival action for pre-death pain and suffering is cognizable and may be brought in conjunction with a death action under DOHSA.

SUMMARY OF ARGUMENT

This Court's prior references to survival causes of action have led lower courts and commentators to an understanding that a survival cause of action, separate and distinct from a wrongful death cause of action, exists to compensate an injured person with damages for personal injuries and associated expenses and that such an action may be maintained by the person's personal representative after his death. *See, Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 575-76 n.2 (1974) ("Wrongful death statutes are to be distinguished from survival statutes."); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 34 (1990) (noting that several Courts of Appeal have identified a general maritime survival cause of action for pre-death pain and suffering as such claims have been "widely accepted."); *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 210 n.7 (1996) (assuming without deciding that a general maritime survival action is created by *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970)). However, this Court has never squarely addressed the issue at bar.

The Courts which have identified a general maritime law survival action have followed this Court's analysis in *Moragne, supra*, which recognized the general maritime

cause of action for wrongful death. In *Moragne*, the Court repudiated the historical disallowance of a common law death action by noting the universal acceptance of recoveries for wrongful death by federal and state legislatures, which evidenced a strong policy to allow the remedy. *Moragne* also specified that a single tortious act could result in two distinct but related harms giving rise to two separate causes of action: one on behalf of the person injured and one, in the case of death, to his/her dependents. *Moragne, supra,* 398 U.S. at 382.

The rationale advanced by *Moragne*, which recognized a general maritime law cause of action for wrongful death, is equally applicable to its companion survival action. As this Court has noted in *Miles, supra,* 498 U.S. at 34, survival action claims for pain and suffering have been "widely accepted" in state and federal statutes. *See also,* Speiser, Krause & Madole, *Recovery for Wrongful Death 3d*, Ch. 14 (1992); Keeton Prosser & Keeton on Torts at 126; Restatement 2d of Torts at 924, 926. Since survival actions have gained almost universal acceptance, there is no public policy which would militate against their recognition under general maritime law and which can coexist alongside a DOHSA death action. Acknowledgment of a maritime survival remedy would not "supplement" the remedies of DOHSA. The survival action is independent of DOHSA since it compensates for the related but distinct harm that arises from the same tortious act that causes the death. *See, Moragne, supra,* 398 U.S. at 382.

The second step in the analysis is to determine whether Congress, in enacting DOHSA, intended to preclude recoveries of damages for pre-death injuries. Historically, the admiralty court has operated under a

charter to give, rather than withhold, remedies. To displace the charter, Congress must act by an explicit statement of purpose or by the adoption of inflexible statutory rules. It has not done so in DOHSA. If a survival action is otherwise valid and cognizable, it must be allowed.

A review of the plain meaning of the language of DOHSA, of its legislative history, and of contemporaneous scholarly articles demonstrates that Congress did not intend to address, nor did it address, a survival cause of action. There is no language in the statute itself or any of the contemporaneous writings that purport to address any claims other than for wrongful death and then only on the high seas. Since Congress did not speak to the issue, it did not foreclose the ability of admiralty law to fill the gap with a general maritime law survival action.

Moreover, in 1980 Congress amended the limitations section of DOHSA to repeal 46 U.S.C. § 763 and enact 46 U.S.C. § 763a, which imposes a time limitation in which to commence "a suit for recovery of damages for personal injury or death, *or both*, arising out of a maritime tort." 46 U.S.C. § 763a (emphasis supplied). The 1980 amendment occurred after the lower courts had begun to recognize a general maritime law survival cause of action akin to the *Moragne* general maritime law death action. As statutes are to be construed to avoid assuming Congress included language which is surplusage, it must be inferred that Congress recognized that death actions and survival actions could coexist with each other, each providing distinctly different remedies.

The general maritime law survival action will apply whenever a non-seafarer[4] is injured by the wrongdoing of others on the high seas and subsequently dies. Depending upon the facts of the accident, the injured party could suffer weeks, months, or years before succumbing to death. During the interim, substantial medical expenses and loss of earnings could be incurred; and significant pain, suffering, and disfigurement could be endured. If a survival cause of action under general maritime law is not available to permit the injured party to recover damages for his injuries, the wrongdoer will escape legal responsibility for the consequences of his wrongdoing to the person against whom the wrong was wrought, not just in this case but in every other one, no matter how long the interval between the original injury and death may be.

ARGUMENT

I. GENERAL MARITIME LAW RECOGNIZES SURVIVAL ACTIONS FOR PRE-DEATH INJURIES

A. There is a Common Law Right to Recover for Personal Injuries, Including Medical Expenses; Loss of Earnings; and Pain, Suffering, and Disfigurement.

Maritime law has long recognized that a person injured on navigable waters may recover for the damage

[4] "Non-seafarer" is meant in the context used by this Court in *Yamaha Motor Corp., U.S.A., supra*, 516 U.S. at 205 n.2 as persons who are neither seamen covered by The Jones Act, 46 U.S.C. App. § 688 (1988 ed.) nor longshore workers covered by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.*

and loss caused by those injuries. *Heredia v. Davies*, 12 F.2d 500, 501 (4th Cir. 1926); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 405-406 (1970), (referring to the maritime body of law applied in personal injury cases); *Dennis v. Central Gulf S.S. Corp.*, 453 F.2d 137, 140 (5th Cir. 1972); *Downie v. United States Lines Co.*, 359 F.2d 344, 347 (3rd Cir.), *cert. denied*, 385 U.S. 897 (1966). Less clear, however, was whether, if the injuries proved fatal, only one cause of action was cognizable, or whether a wrongful death action could be maintained independent of the recovery for the injuries. The Court clarified that ambiguity in *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 575-76 n.2 (1974) (hereinafter *"Gaudet"*) by holding that the two were separate and independent actions.

In *Gaudet*, a longshoreman was seriously injured, but survived long enough to bring a suit for his personal injuries and loss of earnings. He died shortly after that litigation was terminated, and his widow brought a wrongful death action under the *Moragne* general maritime law to recover for her losses suffered as a result of her husband's death. In determining whether the wrongful death action was barred by the earlier settlement of personal injury claims, the Court noted that early cases had construed wrongful death statutes as independent of any right of action that the injured person may have for the personal injuries sustained. *Gaudet, supra*, 414 U.S. at 578 n. 5, *citing* F. Tiffany, *Death by Wrongful Act*, § 23 (2d Ed. 1913); 2 *Harper & James* § 24.2; *Schumacher, Rights of Action Under Death and Survival Statutes*, 23 Mich. L. Rev. 114, 121 (1924); *Blake v. Midland R. Co.*, 18 Q.B. (Ad. & E., N.S. 93, 110, 118 *Eng. Rep.* 35, 41 (1852); *Seward v. Vera Cruz*, 10 App. Cas. 59, 70 (Lord Blackburn); *Michigan*

Cent. R. Co. v. Vreeland, 227 U.S. 59, 68 (1913). If a wrongful death action was not separate and independent, but was merely a continuation of the action for personal injuries, *res judicata* would bar the subsequent death action where the personal injury action had been settled before death. *Gaudet, supra,* 414 U.S. at 578-579.

Gaudet held that *res judicata* would not preclude a wrongful death suit even if a personal injury suit has been previously resolved because the two remedies involve two distinctly different causes of action. *Id.* The Court noted that one line of cases which appeared to bar a wrongful death cause of action when the decedent had recovered for his injuries during his lifetime did so as a result of the specific statutory language of the wrongful death statute at issue which required the existence of an action that the decedent himself could have maintained at the time the wrongful death statute became effective. *Id.* 414 U.S. at 579-580, citing Lord Campbell's Act[5] and cases

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[5] Lord Campbell's Act, 9 & 10 Vict., c.93, An Act for Compensating the Families of Persons Killed by Accidents (Aug. 26, 1846): "Whereas no Action at law is now maintainable against a Person who by his wrongful Act, Neglect, or Default may have caused the Death of another Person . . . : Be it therefore enacted . . . That whensoever the Death of a Person shall be caused by wrongful Act, Neglect, or Default, and the Act, Neglect, or Default is such as would (if Death had not ensued) have entitled the Party injured to maintain an Action and recover damages in respect thereof, then and in every such Case the Person who would have been liable if Death had not ensued shall be liable to an Action for Damages, notwithstanding, the Death of the Person injured, and although the Death shall have been caused under such Circumstances as amount in Law to Felony.

interpreting the Act as conditioning recovery upon the existence of an actionable cause by the decedent at the time of his death. In the absence of a statute mandating that a right of action by the injured person still exists when the death occurs, the personal injury action is independent and grounded in wholly different principles.

Gaudet also noted that the other line of cases which appeared to preclude a wrongful death action when the personal injury action had been concluded also turned on the specific statutory language at issue. For example, the original FELA (Federal Employees Liability Act, 45 U.S.C. § 51) was written in the disjunctive, such that an election had to be made whether to recover for the injured person's damages while he was alive or proceed with a wrongful death action after his death. *Gaudet, supra,* 414 U.S. at 582, n. 9, *citing Seaboard Air Line R. Co. v. Oliver,* 261 Fed. 1, 2 (1919).

DOHSA neither conditions wrongful death recovery on the existence of a pending personal injury action nor requires an election of one remedy over the other. Thus, there are no statutory limitations embodied in DOHSA

"II. And be it enacted, That every such Action shall be for the Benefit of the Wife, Husband, Parent, and Child of the Person whose Death shall have been so caused, and shall be brought by and in the Name of the Executor or Administrator of the Person deceased; and in every such Action the Jury may give such Damages as they may think proportioned to the Injury resulting from such Death to the Parties respectively for whom and for whose Benefit the Action shall be brought . . .

"III. Provided always, and be it enacted That no more than One Action shall lie for and in respect of the same Subject Matter of Complaint . . . ".

which would preclude recovery in the death action independent of a personal injury action.

The Court in *Gaudet* also found it significant that DOHSA had not been interpreted to bar a wrongful death recovery where the decedent had already recovered for his personal injuries during his lifetime, *id.*, 414 U.S. at 583, n. 10, thus implying that there is a common law remedy for personal injuries occurring on the high seas.

Under traditional maritime law, as under the common law, an injured person's unresolved personal cause of action did not survive the injured person's death. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 33 (1990). In a majority of instances, Congress and state legislatures have changed the traditional rule by the enactment of survival statutes. *See, Miles, supra,* 498 U.S. at 33-34. The scope of the general maritime law survival action must be defined by how it compares with a death action and whether there is any overlap of remedies. This Court and the lower courts have consistently recognized that survival causes of action are separate and distinct from claims for wrongful death and that there are no overlapping remedies. Each kind of remedy is designed to compensate for different kinds of loss. *See, Moragne, supra,* 398 U.S. at 381; *Gaudet, supra,* 414 U.S at 578; *Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890, 893 (5th Cir. 1984), citing *Gaudet, supra,* 414 U.S. at 573, 575 n. 2; *Kuntz v. Windjammer "Barefoot" Cruises Ltd.*, 573 F. Supp. 1277, 1284-85 (W.D. Pa. 1983); *Chute v. United States*, 466 F. Supp. 61, 62 (D. Mass. 1978); *In re Inflight Explosion of Trans World Airlines, Inc. Aircraft Approaching Athens, Greece on April 2, 1986*, 778 F. Supp. 625, *rev'd. on other grnds.* 975 F.2d 35 (2d Cir. 1992), *cert. denied*, 113 S.Ct. 1944 (1993).

On the one hand, the wrongful death cause of action is designed to compensate the beneficiaries of the decedent for the losses that they themselves have sustained as a result of the decedent's death. Typically the elements of damages in a wrongful death claim include loss of support; loss of financial contributions; loss of parental advice, guidance, and training; loss of inheritance; loss of services; and, in some (non-DOHSA) instances, non-pecuniary damages for loss of society. *Azzopardi, supra,* 742 F.2d at 893; *Kuntz, supra,* 573 F. Supp. at 1284; *Chute, supra,* 466 F. Supp. at 62.

On the other hand, the survival cause of action is designed to compensate the personal representative of the decedent's estate (as the replacement holder of the claim after the injured person dies) for damages that the decedent himself could have recovered but for his death. *Azzopardi, supra,* 742 F.2d at 893; *Chute, supra,* 466 F. Supp. at 52; *Kuntz, supra,* 573 F. Supp. at 1284.

This Court, in *Yamaha Motor Corp. U.S.A. v. Calhoun*, 516 U.S. 199 (1996), affirmed the decision by the Court of Appeals for the Third Circuit, which included the following succinct explanation of the distinction between the wrongful death cause of action and the decedent's action for pain and suffering preceding death:

> . . . Throughout the previous discussion of the case law, reference has been made to wrongful death actions and to survival actions. Although they are often lumped together without any distinction . . . they are, in fact, quite distinct . . .

A wrongful death cause of action belongs to the decedent's dependents (or closest kin in the case of the death of a minor). It allows the beneficiaries to recover for the harm that *they* personally suffered as a result of the death, and it is totally independent of any cause of action the decedent may have had for his or her own personal injuries. Damages are determined by what the beneficiaries would have "received" from the decedent . . . A survival action, in contrast, belongs to the estate of the deceased (although it is usually brought by the deceased's relatives acting in a representative capacity) and allows recovery for the injury to the *deceased* from the action causing death. Under a survival action, the decedent's representative recovers for the decedent's pain and suffering, medical expenses, lost earnings . . . and funeral expenses . . . *Calhoun v. Yamaha Motor Corp.*, 40 F.3d 622, 737-38 (3d Cir. 1994) (citations omitted; emphasis by the Court).

Since the two kinds of actions (death and survival) encompass separate and distinct measures of damages and beneficiaries, "American courts have painstakingly distinguished the two causes of action for many years." *Kuntz, supra,* 573 F. Supp. at 1285. *See also, Miles v. Melrose,* 882 F.2d 976, 985 (5th Cir. 1989) *rev'd. on other grnds. sub nom. Miles v. Apex Marine Corp.,* 498 U.S. 19 (1990); *Wahlstrom v. Kawasaki Heavy Indus., Ltd.,* 4 F.3d 1084, 1093 (2d Cir. 1993).

The elements of damage in a survival action are different in nature than the elements of damage in the DOHSA death action and are, thus, not inconsistent with being brought in conjunction with a DOHSA action.

Damages for pain and suffering of the injured person and reimbursement for medical expenses, for example, have no corollaries in a wrongful death recovery. Loss of earnings between the time of injury and the time of death are awarded to the individual; wrongful death claims for loss of support to family members arise only after the death.[6]

B. General Maritime Law Provides for a Survival Action For Pre-Death Pain and Suffering.

The historical basis for the common law's prohibition against continuing an injured person's unresolved personal injury action after his death, as was discussed in *Moragne,* was grounded in the rule of *Baker v. Bolton,* 1 Camp. 493, 170 Eng. Rep. 1033 (1808) and the "felony-merger" doctrine. *The Harrisburg,* 119 U.S. 199 (1886), concluded that the admiralty had to follow the common law. In *Moragne,* Justice Harlan, writing for a unanimous Court, while not quite repudiating the validity of *The Harrisburg* at the time of the decision[7], noted the duty of the Court to acknowledge the impact of major legislative innovations, to wit: the wholesale adoption of statutes

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[6] The factual viability of the action will, of course, depend upon the circumstances in each case and whether the plaintiff can meet his/her burden of proof that the decedent survived an appreciable time between the injury and death and that decedent suffered the damages alleged.

[7] The Court did note, however, that the decision in *The Harrisburg* was "somewhat dubious even when rendered." *Moragne, supra,* 398 U.S. at 378.

permitting recovery for wrongful death, and to interweave the new policies with "the inherited body of common law principles." *Moragne*, 398 U.S. at 392.

Moragne established that general maritime law provided a cause of action for wrongful death in territorial waters. In *Moragne*, the Court specifically noted that the maritime law of the United States could change by common acceptance among the states of a policy permitting recovery for wrongful death, which then becomes a part of American jurisprudence. *Id.* 398 U.S. at 390. Similarly, in the spirit of *Moragne*, a survival cause of action must be acknowledged under general maritime common law since the majority of states permit some kind of survival actions. *Miles*, 498 U.S. at 33-35; Keeton, Prosser and Keeton on Torts at 126; Restatement 2d of Torts at 924, 926.[8]

Following *Moragne*, many federal circuit and district courts relied on its rationale to hold that the general maritime law encompassed a general maritime survival action, one that permitted recovery for conscious pain

[8] In *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 284 (1980), the Court also acknowledged that the currently prevailing views about compensation for an element of damages (there, the right of a spouse to recover for loss of consortium for personal injury to her husband), evidenced by a majority of the states permitting such recovery, could change prior rejection of such damages under general maritime law to acceptance (rejecting the prior disallowance of loss of consortium damages in *Igneri v. Cie. de Transports Oceaniques*, 323 F.2d 257 (Ca.2d 1963), *cert. denied* 376 U.S. 949 (1964)).

and suffering and other claims for monetary damages which survive the death of the injured person. *See, e.g., Preston v. Frantz*, 11 F.3d 357 (2nd Cir. 1993); *Zicherman v. Korean Air Lines Co., Ltd.*, 43 F.3d 18, 23[9] (2nd Cir. 1994), *rev'd in part on other grnds.*, 516 U.S. 217 (1996); *Greene v. Vantage S.S. Corp.*, 466 F.2d 159, 166 (4th Cir. 1972); *Barbe v. Drummond*, 507 F.2d 794, 799 (1st Cir. 1974); *Law v. Sea Drilling Corp.*, 523 F.2d 793, 795 (5th Cir. 1975); *Miles, supra*, 882 F.2d at 985-987; *Spiller v. Thomas M. Lowe, Jr. & Assoc., Inc.*, 466 F.2d 903, 909 (8th Cir. 1972); *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1549 (11th Cir. 1987); *Anderson v. Whittaker Corp.*, 894 F.2d 804 (6th Cir. 1990); *Complaint of Merry Shipping, Inc.*, 650 F.2d 622, 623-624 (5th Cir. 1981); *Favaloro v. S/S Golden Gate*, 687 F. Supp. 475, 479-480 (N.D. Cal. 1987); *Kuntz, supra*, 573 F. Supp. at 1284; *Chute, supra*, 466 F. Supp. at 69-70; *McAleer v. Smith*, 791 F. Supp. 923, 926 (D.R.I. 1992); *Rye v. U. S. Steel Mining Co., Inc.*, 856 F. Supp. 274, 279 (E.D. Va. 1994); *Cantore v. Blue Lagoon Water Sports, Inc.*, 799 F. Supp. 1151, 1156 (S.D. Fla. 1992); *Gray v. Lockheed Aeronautical Sys. Co.*, 125 F.3d 1371 (11th Cir. 1997), *cert. pending* Docket No. 97-1209; *Newhouse v. United States*, 844 F. Supp. 1389, 1393 (D.Nev. 1994). *See also*, George and Moore, *Wrongful Death and Survival Actions under the General Maritime Law: Pre-Harrisburg through Post-Moragne*, 4 J. Mar. L. and Comm. 1, 13 (1972) ("It would be anomolous to hold that admiralty did not recognize the survival of actions when the historical basis for denying a cause of action for wrongful

[9] The Second Circuit *Zicherman* decision held that federal maritime law supplied the measure of damages but did not specifically apply it to the pain and suffering claim as KAL had not challenged the legal basis to assert the claim on appeal.

death, rejected an inappropriate for continuing the rule of *The Harrisburg*, is the same as that for survival actions." (footnote omitted)).

The general maritime survival cause of action is distinct from, and ungoverned by, any wrongful death remedy, whether the death remedy is DOHSA, the Jones Act (46 U.S.C. App. § 688 *et seq.*), or a *Moragne* cause of action. Legislative enactments broadening the policy judgment that personal injury actions should be continued by the injured person's personal representative have eroded the historical basis for disallowance of such actions. The Court should squarely hold that the general maritime law permits an action for personal injuries to a non-seafarer injured by wrongful act on the high seas for losses suffered during the decedent's lifetime, and that such an action survives after his death and may be maintained by his personal representative.

Since the rule of law announced by the Court will affect the rights of all non-seafarers injured on the high seas, the Court must consider fact patterns beyond that presented in Petitioners' case in defining the scope of the general maritime law survival action. The Court has noted that the Jones Act and many states provide survival remedies for the losses suffered during the decedent's lifetime. *Miles, supra,* 498 U.S. at 35. Those losses would include pain, suffering, and disfigurement; medical expenses; and lost wages from the date of injury to the date of death. Thus, although Petitioners can only recover for the decedents' pre-death pain and suffering, many others will sustain out-of-pocket losses that are governed by this ruling.

The District of Columbia Circuit found the contours of petitioner's proposed survival action uncertain. *Dooley, supra,* 117 F.3d at 1482. It assumed that the survival cause of action would permit the decedent's estate to recover for the decedent's pre-death injuries. *Id.* Exactly! However, the estate is not a wrongful death beneficiary; rather, the estate is the holder of the survival cause of action to be distributed to whomever the beneficiaries are under the laws of the state in which the estate is probated. While the persons themselves may be the same as may recover under the death action, *e.g.* spouse, children or parents, they are recovering figurative apples under the death action, and oranges under the survival action. The death action beneficiaries recover for their own losses occasioned by the death. If any family members obtain any portion of the estate recovery, it is only because the applicable state intestacy statute permits the decedent's recovery to pass through to that category of persons (e.g. spouse, child) after the decedent's death, just as do the decedent's other assets.

II. CONGRESS DID NOT INTEND TO PRECLUDE SURVIVAL ACTION REMEDIES WHEN IT ENACTED DOHSA

A. DOHSA Does Not Preclude or Eliminate Survivorship Actions.

DOHSA is a wrongful death statute and contains no survival provision. *Gaudet, supra,* 414 U.S. at 575-76, 575

n.2. The absence of a survival provision leaves a legislative void which, in turn, allows the general maritime law survival action to coexist with the wrongful death remedies under DOHSA. This precept has been accepted in cases in which the death action was governed by DOHSA by the Eleventh Circuit (*Gray, supra,* 125 F.3d at 1381-1386), by the First Circuit (*Barbe, supra,* 507 F.2d at 799-800), by the Fifth Circuit (*Azzopardi, supra,* 742 F.2d at 893-894; *Law, supra,* 523 F.2d at 795), and by the Second Circuit (*Zicherman, supra,* 43 F.3d at 23; *Preston, supra.* 11 F.3d at 358). It has also been accepted in the context of a *Moragne* death action by the Eighth Circuit, *Spiller, supra,* 466 F.2d at 909-10; by the Fourth Circuit, *Greene, supra,* 466 F.2d at 163-167; by the Fifth Circuit, *Dennis, supra,* 453 F.2d at 140-141; and by the Sixth Circuit, *Anderson, supra,* 894 F.2d at 813-814. Only the Ninth Circuit[10] and District of Columbia Circuit have rejected the precept. *Saavedra v. Korean Air Lines Co., Ltd.,* 93 F.3d 547 (9th Cir. 1996); *Dooley v. Korean Air Lines Co., Ltd.* (*In re Korean Air Lines Disaster of Sept. 1, 1983*), 117 F.3d 1477 (D.C. Cir. 1997).

Whether a general maritime law survival remedy can be asserted in conjunction with a DOHSA death action turns on whether, in enacting DOHSA, Congress intended to bar survival remedies. In interpreting a Congressional statute, it is imperative for the Courts to identify Congress' intent and to give it effect by examining

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[10] Prior to the recent *Saavedra* decision, the Ninth Circuit had held that a survival cause of action existed for pre-death pain and suffering which could be brought in conjunction with a *Moragne* general maritime law wrongful death action. *Evich v. Connelly,* 759 F.2d 1432, 1434 (9th Cir. 1985).

the ordinary meaning of the language that Congress employed. *Park 'N Fly Inc. v. Dollar Park and Fly, Inc.* 469 U.S. 189 (1985); *United States v. Turkette,* 452 U.S. 576 (1981) quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102 (1980). As many courts have found, there is no specific reference in DOHSA to "survival actions" or "survival remedies." *Gray, supra,* 125 F.3d at 1383; *Kuntz, supra,* 573 F. Supp. at 1285; *Azzopardi, supra,* 742 F.2d at 894. This Court has acknowledged that DOHSA does not contain survival provisions. *Gaudet, supra,* 414 U.S. at 575, n.2.

Since Congress was silent on the issue of survival remedies, other interpretative devices must be used to determine the scope of Congressional intent. Under this Court's general preemption analysis, there is a strong presumption *against* preempting other sources of remedies, be they state law or common law remedies. Only when there are explicit statements of preemption in the statutory language, or when the presumption is implicit because the statute's structure and purpose so thoroughly occupies the field that Congress has left no room for supplementation, should other remedies be barred. *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 516 (1992) (state common law remedies); *Hillsborough County, Fla. v. Automated Medical Lab., Inc.,* 471 U.S. 707, 716 (1985) (state regulations); *California v. ARC America Corp.,* 490 U.S. 93, 101 (1989) (state anti-trust law).

As Chief Justice Chase, sitting on the Circuit in *The Sea Gull,* 21 F. Cas. 909, 910 (No. 12, 578) (C.C.D.Md. 1868) said in the maritime context:

> . . . certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, *when not required to withhold it by established and inflexible rules.* (emphasis supplied)

This Court has also held that there appears no intention by Congress that DOHSA have any effect in "foreclosing non-statutory federal remedies that might be found appropriate to effectuate the policies of general maritime law." *Moragne, supra,* 398 U.S. at 400; *Gaudet, supra,* 414 U.S. at 588, n. 22; *American Export Lines Inc. v. Alvez,* 446 U.S. 274, 285 (1980).

Thus, unless the language of DOHSA or its legislative history clearly indicates that Congress had an "established and inflexible" intent to preclude a survival action claim, it cannot be barred.

B. The History of DOHSA Does Not Support Preemption.

The possible preemptive effect of DOHSA must be viewed in light of the historical precedent leading to its passage. The common law of England arguably did not permit a common law action for wrongful death. *Moragne, supra,* 398 U.S. at 382. In 1886, this Court held that admiralty afforded no remedy for wrongful death in the absence of an applicable federal or state statute. *The Harrisburg,* 119 U.S. 199 (1886). After *The Harrisburg,* wrongful death actions in the maritime context had to rely on state wrongful death statutes, e.g. *The Hamilton* 207 U.S. 398 (1907); *The Tungus v. Skovgaard,* 358 U.S. 588

(1959) (death of a non-seaman in territorial waters); *Hess v. United States,* 361 U.S. 314 (1960) (same).

In 1920, Congress passed two statutes to ameliorate the harsh rule of *The Harrisburg*. The first was the Death on the High Seas Act. Two months later, Congress passed a comprehensive measure dealing with many facets of the maritime industry known as the Merchant Marine Act of 1920. Ch. 250, 41 Stat. 988. Embedded in its many provisions was Section 33, Jones Act, 41 Stat. 1007 (1920), 46 U.S.C. App. § 688 (1988 ed.) which incorporated by reference the Federal Employer's Liability Act (FELA), 35 Stat. 65 (1908), as amended 46 U.S.C. §§ 51-60 (1988 ed.). The Jones Act extended to any "seaman" the same statutory remedies for injuries that were available to railroad workers. The coverage of the Jones Act extended to all navigable waters. DOHSA's coverage was limited to recovery of damages resulting from "wrongful act, neglect or default" occurring more than a marine league from shore. § 1, 41 Stat. 537 (1920), 46 U.S.C. § 761 (1988 ed.).

The legislative history clearly shows that DOHSA's enactment was to rectify the harshness of the rule in *The Harrisburg* so that there was some *wrongful death* remedy available for accidents occurring on the high seas. Representative Volstead, who sponsored the bill stated its purpose as follows:

> The object of this bill is to give a cause of action in case of death resulting from negligence or wrongful act occurring on the high seas. Nearly all countries have modified the old rule which did not allow relief in the case of death under such circumstances. Under what is known as

> Lord Campbell's Act[11], England, many years ago, authorized recovery in such cases. France, Germany, and other European countries now follow this more humane and enlightened policy and allow dependent parties to recover in case of death of their near relatives upon the high seas.

Congressional Record, 66th Congress, Volume 59, Page 4402.

Representative Volstead's comments relate to a death action, dependents, beneficiaries, and Lord Campbell's Act (a wrongful death statute), not to any survival remedies, *see*, *Gray, supra*, 125 F.2d at 1384, since survival actions do not address issues such as dependents and beneficiaries. *Id.*

This Court has previously commented that the legislative histories of DOHSA and the Jones Act are not models of considered legislative judgment. *American Export Lines, Inc., supra*, 446 U.S. at 283. One commentator has opined that little can be gleaned about the intent of Congress in the legislative history of DOHSA and the Jones Act as there were no clear guidelines established by Congress of its cohesive purpose in enacting the legislation. Day, *Maritime Wrongful Death and Survival Recovery: The Need for Legislative Reform*, 64 Colum. L.R. 648, 654 (1964) (hereinafter "Day"). Mr. Day points out that the enormous and diverse workload of the 1920 Congress prevented it from careful consideration or lengthy discussion of how each section of the intricate statutes could affect the similarly complex law of admiralty. *Id.*

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[11] *See*, fn. 6, *supra*.

Another commentator, who describes himself as the drafter of much of the language of DOHSA, acknowledges that he understood the distinction between survival actions and death actions and that, in his opinion, DOHSA is only a death action. Hughes, *Death Actions in Admiralty*, 31 Yale L.J. 115, 116, 120 (1921). Thus, there is nothing in either DOHSA itself or the history back to its passage to suggest that Congress meant to deal with, let alone eliminate, survival actions.

C. Subsequent Amendment Replacing § 763 with § 763a Acknowledges Congress' Approval of Survival Actions Coexisting with DOHSA Death Actions.

In 1980, Congress amended DOHSA to repeal § 763 and enact § 763a which provides:

> Unless otherwise specified by law, a suit for recovery of damages for personal injury or death, ***or both***, arising out of a maritime tort, shall not be maintained unless commenced within three years from the date the cause of action accrued.

Oct. 6, 1980, P.L. 96-382, § 1, 94 Stat. 1525 (emphasis added).

The prior limitation section, 46 U.S.C. § 763, provided:

> Suit shall be begun within two years from the date of such wrongful act, neglect, or default, unless during that period there has not been reasonable opportunity for securing jurisdiction on the vessel, person, or corporation sought to be charged, but after expiration of such period

> of two years the right of action hereby given shall not be deemed to have lapsed until ninety days after a reasonable opportunity to secure jurisdiction has offered.

March 30, 1920, C.111, § 3, 41 Stat. 537.

The 1980 amendment changed several substantive provisions of its predecessor. First, it changed the time from which the statute began to run from the date of the wrongful act, neglect or default to the date the cause of action accrues. The cause of action for wrongful death usually accrues as of the date of death no matter how long a time has elapsed from the date of injury. *See*, Speiser Krause & Madole, *Recovery for Wrongful Death*, 3d § 11:10, 11:12 (1992). The amendment thus aligned DOHSA with the majority of other wrongful death statutes which begin the running of the statute of limitations at the date of death since the cause of action belongs to the survivors and does not accrue until the death occurs.

Second, the 1980 amendment broadened the statute of limitations to extend to actions for "personal injury or death, *or both*" and made the period for both three years. (emphasis supplied). The clear language of the provision contemplates that there can be two actions, one for personal injuries (which survive after the death) and one for wrongful death, which can be brought concurrently, i.e. "both," as long as they are brought within the time restrictions. Statutes must be construed to avoid assuming that Congress includes language in a statute that is purely surplusage. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982). It is difficult to identify a purpose for the "or both" language other than a recognition that both

survival and death actions may be maintained simultaneously. Because 46 U.S.C. § 763a also extended the statute of limitations to cover all maritime torts, it might be argued to encompass only non-DOHSA survival actions. However, the argument must fail because § 763a was enacted as part of *DOHSA*. The only rational inference is there is no Congressional policy to preclude the survival of actions for personal injuries which may be brought concurrently with a DOHSA death action. In addition, *Spiller, supra*, 466 F.2d at 909; *Barbe, supra*, 507 F.2d at 799-800; and *Law, supra*, 523 F.2d at 795, each of which was decided before the 1980 amendment, recognized maritime survival actions. Therefore, the 1980 Congress' approval of survival actions for personal injury to be maintained alongside DOHSA death actions may have resulted from Congress' cognizance of, and is surely consisted with, the development, of the general maritime survival action akin to the *Moragne* wrongful death action.

D. The Reference to an Action Surviving in 46 U.S.C. § 765 Does Not Preclude a General Maritime Law Survival Action.

The D.C. Circuit relied upon 46 U.S.C. § 765 (App. 3a-4a), which has remained unchanged since 1920, as support for the argument that DOHSA created a limited survival provision. The D.C. Circuit considered § 765 to be an expression of legislative judgment on the extent to which survival actions were to be permitted by Congress under DOHSA. *Dooley, supra*, 117 F.3d at 1482. Other courts and commentators have disagreed. *See, e.g., Gray, supra*, 125 F.3d at 1383-84; *Bodden v. American Offshore,*

Inc., 681 F.2d 319, 331-32 (5th Cir. 1982); *Kuntz, supra*, 573 F. Supp. 1285; Hughes, *supra*, 31 Yale L.J. at 126; Maraist, *Admiralty Jurisdiction: Developments in the Law, 1983-84*, 45 La. L. Rev. 179, 196 (1984) (Section 765 is a "non-abatement" and "conversion" statute that permits, if a victim files suit and then dies of his injuries, his representatives may proceed with wrongful death damages under DOHSA).

The better interpretation of § 765 is that it is a grant of permission ("*may* be substituted as a party and the suit *may* proceed . . . " (emphasis added.)) for the beneficiaries to continue the injured party's original suit as a wrongful death remedy if the death occurred after the expiration of the statute of limitations contained in the Act (originally, two years from the date of the wrongful act). *Gray, supra* at 1383-84; *Kuntz, supra*, 573 F. Supp. at 1285. The section is permissive but does not *require* the personal representative to elect to proceed under DOHSA and abandon any survival action that was available under applicable statutes or general maritime law.

The interpretation that § 765 is a permissive means of ensuring the survival of the wrongful death remedy when death occurs after DOHSA's statute of limitations has expired comports with the understanding of one of the primary drafters, Mr. Robert M. Hughes. In his 1921 law review article, Mr. Hughes notes that the drafters of DOHSA set the date from which to begin the running of the statute of limitations as the date of the wrongful act rather than, as was more typical, the date of the death. Hughes, *supra*, at 126. If the injured person survived past the two year statute of limitations from the date of the wrongful act, his beneficiaries would lose the right to

pursue a death action but for § 765, which enabled the badly injured person to preserve the DOHSA action by suit during his lifetime.

It is also significant that § 765 says that, in the event of the death of the person injured, the suit may be maintained by the personal representative as an action under the Act for recovery of compensation provided by 46 U.S.C. § 762, which clearly relates to wrongful death beneficiaries and compensation for losses to survivors of a decedent in a wrongful death action, rather than for the injured person's personal injuries.

E. The Existence of a Survival Action Remedy in the Jones Act Does Not Imply that Congress Deliberately Excluded a Survival Action Remedy under General Maritime Law with a DOHSA Death Action.

The D.C. Circuit also found it significant in its denial of survival action damages that, at about the same time DOHSA was enacted, Congress enacted the Jones Act which includes a survival provision. *Dooley, supra*, 117 F.3d at 1481-1482. But the lower court's emphasis on the Jones Act is unwarranted.

Although the Jones Act was passed by the same 1920 Congress as passed DOHSA, it was just one section of a comprehensive legislation dealing with numerous maritime measures. Day, *supra*, at 652. It incorporated by reference the Federal Employers Liability Act [FELA] wholesale as the body of law to be applied to seamen in suits for negligence against their employers. The legislative histories of neither statute explains why a survival

action remedy was included in the Jones Act but not in DOHSA, but several courts and commentators view the incongruity **not** as considered judgment of Congress, but as a function of Congress' expediency in adopting FELA wholesale into the Jones Act without careful consideration of each and every provision. *See, e.g., Dugas v. National Aircraft Corp.*, 438 F.2d 1386, 1390 (3rd Cir. 1971) (recognizing that the Jones Act survival remedy is only derivative, arising from a wholesale imputation of FELA); Day, *supra*, 64 Colum. L.R. at 654 ("It is probable that the survivors of seamen were entitled to that remedy [a survival action] not as the result of conscious decision but rather because of its fortuitous inclusion in the FELA.") It also made sense for Congress to legislate comprehensively for seamen in the Jones Act, but not to attempt to do so for non-seafarers who might be injured and eventually die from the injuries sustained on the high seas.

F. This Court has Never Interpreted DOHSA to Preclude a General Maritime Law Survival Action.

The D.C. Circuit relied on the Court's decision in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978) to suggest that DOHSA precludes the use of a general maritime law survival action to supplement the recovery allowed under DOHSA. But *Higginbotham* involved *only* the question of whether non-pecuniary damages for loss of society (traditionally, a loss to the survivors which is clearly a measure of damages in a wrongful death action) could be recovered in the *death action* under DOHSA by the overlay of general maritime law. The Court, speaking only to remedies available in the death action, held that

statutory damages recoverable under DOHSA could not be supplemented by general maritime law to provide a recovery for loss of society. The Court also noted that DOHSA does not address every element of wrongful death law, *id.*, clearly defining DOHSA as a death act. *Higginbotham, supra*, 436 U.S. at 625. *See also, Miles, supra*, 498 U.S. at 31, in which the Court confirmed that *Higgenbotham* held that DOHSA limits recoveries in *wrongful death suits*. (emphasis added).

The other Courts of Appeal and lower courts addressing the issue after *Higginbotham* have limited its holding to the wrongful death action, concluding that the limitations in DOHSA for death actions have no effect on a survival action even though both sets of injuries arise from the same tortious act. *Barbe, supra*, 507 F.2d at 800. ("[Acknowledging a general maritime survival action] also avoids a conflict with DOHSA, since survival and wrongful death actions have long been recognized as distinct causes of action." (citations omitted)); *Azzopardi, supra*, 742 F.2d at 893; *Kuntz, supra*, 573 F. Supp. at 1285; *Chute, supra*, 466 F. Supp. at 69; *McAleer, supra*, 791 F. Supp. at 926-27; *Gray, supra*, 880 F. Supp. at 1569; *Rye, supra*, 856 F. Supp. at 279.

Since DOHSA does not address a survival action for pre-death pain and suffering, it leaves a gap in the coverage provided by DOHSA. As Justice Stevens pointed out in *Higginbotham, supra*, 436 U.S. at 625, "[t]here is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." Because DOHSA is a wrongful death statute and not a survival statute, the maritime law is free to fill what otherwise would be a legislative void

by creating a federal survival action which would apply to injuries sustained by persons who subsequently die from the tortious conduct occuring on the high seas. *See, e.g. Barbe, supra,* 507 F.2d at 799-800; *Chute, supra,* 466 F. Supp. at 69; *Azzopardi, supra,* 742 F.2d at 893.

Subsequent to *Higginbotham,* the Court addressed some of the issues relating to the general maritime survival cause of action in *Miles, supra,* 882 F.2d 976, an action brought under the Jones Act and general maritime law. In *Miles,* the mother of a deceased seaman claimed a recovery under the Jones Act in negligence and under a general maritime *Moragne* death action for unseaworthiness. The Court held that both actions could be maintained simultaneously. *Miles, supra,* 498 U.S. at 30.

The seaman's mother also brought a survival cause of action under general maritime law on behalf of the estate for the seaman's lost future earnings. The Fifth Circuit held that the general maritime law did not create a cause of action for loss of future wages, but upheld the award of loss of support and services to the mother and to the estate for pre-death pain and suffering under the negligence (Jones Act) cause of action.

This Court then had to determine "in a general maritime action surviving the death of a seaman" what damages were recoverable. The Court noted that Congress and the States have changed the traditional maritime law that a seaman's personal cause of action does not survive his death by statutorily providing that right of action for injuries survives to the decedent's personal representative. *Miles, supra,* 498 U.S. at 33.

Miles acknowledged that many lower courts had concluded that the general maritime law prohibiting survival actions had been changed by the widespread adoption of survival statutes in analogous state and federal legislation, underlying a policy judgment in favor of survival akin to that in the death context in *Moragne. Id.* 498 U.S. at 34. However, as there was clearly a right to recover for the seaman's pre-death pain and suffering under the Jones Act, the only element of damages specifically to be addressed by the Court under the general maritime law was a right to recover for lost future wages. The Court denied the loss of earnings recovery by noting that only a few states permitted a recovery in a survival action for lost future earnings. *Id.* 498 U.S. at 35. This notation was by way of comparison with the kind of "wholesale" and "unanimous" policy judgment permitting recoveries for wrongful death that was in effect in the states of the United States that had prompted the Court to create the new cause of action in *Moragne. Id.* 498 U.S. at 34. The Court reasoned that, since the considered judgment of a large majority of American legislatures was to preclude recovery for loss of future income in a survival action, that recovery as a measure of damages had not become the general law of the United States and, if adopted, would be a strictly minority view. The Court also noted that the Jones Act survival action was statutory and the Jones Act/FELA survival provision limits recovery to losses suffered during the decedent's lifetime. *Miles, supra,* 498 U.S. at 56, *citing* 45 U.S.C. § 59 [45 U.S.C.S. § 59]. Since, in Jones Act cases, the survival action was

statutory, its elements could not be broadened by general maritime law.

In declining to adopt the minority view permitting recovery of lost future wages, the Court opined that, absent the statutory parameters of the survival action in the Jones Act/FELA, it would not necessarily be deterred from adopting the better rule of law even if it was a minority view inasmuch as there are strong policy arguments in favor of the remedy. *Id.* 498 U.S. at 35-36. Similarly there are strong policy arguments in favor of a survival action remedy encompassing damages for pre-death pain and suffering, medical expenses, and lost wages during the decedent's lifetime. *See*, § III, *infra*, at 40-42. Since there are no statutory parameters which define the scope of the general maritime law survival action, the Court must fill the gap left by Congress and permit recovery for an injured person's lifetime damages.

This Court has also noted that DOHSA has not been interpreted to bar a wrongful death recovery where the decedent had already recovered for his personal injuries during his lifetime, *Gaudet, supra*, 414 U.S. at 583, n. 10, thus implying there is a general maritime recovery for personal injuries separate from a subsequent death action.

Although footnote 10 in *Gaudet* did not reference case authority, the Fifth Circuit squarely addressed the issue in *Bodden v. American Offshore, Inc.*, 681 F.2d 319 (5th Cir. 1982). In *Bodden*, a seaman sustained serious injury in an engine room explosion on the high seas for which he filed suit and received a settlement in the year of his injury. Three years later, he committed suicide allegedly because

of the pain associated with the injuries. His widow brought a wrongful death suit based on unseaworthiness under DOHSA. The Fifth Circuit affirmed the lower court's allowance of the death action by determining that, unless DOHSA and its legislative history evidenced an established and inflexible intent to preclude the death action because of the recovery under the personal injury action, the historical flexibility of maritime law to give, rather than withhold, a remedy would permit the death action. If Congress had addressed the personal injury action in its contemplation of DOHSA, the death action would be barred. If Congress did not address recoveries for personal injuries prior to death in DOHSA, the personal injury action would be separate and independent and its settlement would not effect the vitality of the death action.

The Fifth Circuit in *Bodden* analyzed the relevant sections of DOHSA and concluded that Congress did not intend to address, nor did it address, the two causes of action. Congress' intent, rather than speaking to survival actions, was to fill a narrow statutory void, i.e. for deaths that occur on the high seas. Congress' narrow allowance of the death action should not block the evolution of general maritime law in areas in which Congress did not speak, as for personal injuries prior to death. *Id.* 681 F.2d at 332.

The only rational reading of footnote 10 in *Gaudet* is that survival actions are independent of DOHSA's wrongful death recoveries and may be maintained by the decedent prior to his death or by his personal representative if he dies of his injuries before the personal injury action is resolved.

III. THERE ARE STRONG POLICY REASONS TO ACKNOWLEDGE A SURVIVAL CAUSE OF ACTION TO PREVENT UNFAIRNESS AND INEQUITY

The Warsaw Convention was intended to insure compensation to passengers injured or killed during international air transportation, albeit with a monetary limit for ordinary negligence. *In re Air Disaster at Lockerbie, Scotland on Dec. 21, 1988*, 37 F.3d 804, 829 (2nd Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995). With the *Zicherman* direction that Warsaw is merely a pass-through with respect to damages law, the substantive law must come from another source. That source is general maritime law for the survival action. General maritime law embodies not only claims for injuries to airline passengers whose injuries, while of the most severe nature, are often of limited duration, but also claims by all non-seafarers injured by wrongful act on the high seas. Injuries so sustained can result in lingering effects which last weeks, months, or years before they finally end in death.[12] Hundreds, if not thousands, of people a year – oil rig workers injured enroute over the high seas in helicopter accidents, airline passengers, passengers on cruise ships[13] or ferries, and the like – who are injured by wrongful acts upon the high

[12] Note, for example, the facts of the accidents in *Gaudet, supra*, and *Bodden, supra*, Mr. Gaudet survived many months before he died, long enough to settle his personal injury claim and Mr. Bodden survived three years before he died.

[13] DOHSA has been held applicable to cruise ship passengers. *Howard v. Crystal Cruises, Inc.*, 41 F.3d 527 (9th Cir. 1994); *Moyer v. Klosters Rederi*, 645 F. Supp. 620 (S.D. Fla. 1986); *Klinghoffer v. S.N.C. Achille Lauro*, 739 F. Supp. 854 (S.D.N.Y. 1990).

seas would be denied recovery for serious and severe injury and impairment of well-being if a survival action is denied. Consider, for example, a passenger on a ferryboat injured by severe burns in an engine room explosion on the high seas enroute from Los Angeles to Catalina Island[14] 26 miles away, who then lingers for months or years in the most excruciating pain before finally succumbing to death. If he has no dependents, or if he is incapable of resolving an action for his injuries before his death, he goes uncompensated if there is no general maritime law survival action. If that is the result, then the wrongdoer would be motivated to prolong the personal injury litigation for years in the hopes of the injured person's demise and, with it, the demise of the wrongdoer's legal impunity.

Most states in the United States provide survival actions to compensate the injured party for his lifetime damages. *Miles, supra*, 498 U.S. at 33-34. Daily in American courts, judges and juries are asked to evaluate predeath injuries in common automobile accident and medical malpractice cases. The courts are able to prevent double recoveries and to monitor allowable damages to preclude unreasonable results.

This Court has always acknowledged the special solitude given to those who brave the seas. *Moragne, supra*, 398 U.S. at 387. The Court has also applied maritime precepts to non- seafarers who are injured or killed on or

[14] Or, for another example, a ferry from Connecticut to Nantucket Island. *See, Preston, supra*.

over the seas where the activity is one that would traditionally have been conducted by water craft regardless of the lack of their conscious assumption of the risks of the sea. *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio,* 409 U.S. 249 (1972); *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207 (1986).

Seamen *voluntarily* undertake the rigors and hazards of life on the sea. Airplane passengers and other non-seafarers have imposed upon them maritime's body of law even though they do not voluntarily elect its provisions, yet they are still exposed to maritime hazards which result in injuries and death. Since the Court has imposed maritime precepts on non-seafarers, it should strive to make uniform the remedies, especially inasmuch as a general maritime survival action does not intrude on the coverage provided by DOHSA.

IV

CONCLUSION

For all of the foregoing reasons, the Court of Appeals erred in prohibiting general maritime law survival causes of action to be maintained by Petitioners. Accordingly, the judgment of the Court of Appeals should be reversed and the actions remanded to the District Court for further proceedings to permit Petitioners to pursue wrongful death actions under DOHSA and general maritime survival actions.

Dated: February 19, 1998

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APPENDIX

Relevant Provisions of the Warsaw Convention

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking. 49 Stat. 3018.

Article 24

1. In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

2. In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights. 49 Stat. 3020.

Article 25(1)

1. The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the Court to which the case is submitted, is considered to be equivalent to wilful misconduct. 49 Stat. 3020.

Relevant Provisions of the Death on the High Seas Act, 46 U.S.C. § 761 *et seq.*

§ 761. Right of Action; where and by whom brought

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the territories or dependencies of the United States', the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

§ 762. Amount and apportionment of recovery

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

§ 763. Prior Limitation Section [Repealed]

Suit shall be begun within two years from the date of such wrongful act, neglect, or default, unless during that period there has not been reasonable opportunity for securing jurisdiction on the vessel, person, or corporation

sought to be charged, but after expiration of such period of two years the right of action hereby given shall not be deemed to have lapsed until ninety days after a reasonable opportunity to secure jurisdiction has offered.

§ 763(a). Limitations

Unless otherwise specified by law, a suit for recovery of damages for personal injury or death, or both, arising out of a maritime tort, shall not be maintained unless commenced within three years from the date the cause of action accrued.

§ 764. Rights of action given by laws of foreign countries

Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.

§ 765. Death of plaintiff pending action

If a person die[s] as the result of such wrongful act, neglect, or default as is mentioned in section 761 of this title during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in

respect of such act, neglect, or default, the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this chapter for the recovery of the compensation provided in section 762 of this title.

§ 766. Contributory Negligence

In suits under this Act [46 USCS Appx §§ 761 et seq.] the fact that the decedent has been guilty of contributory negligence shall not bar recovery, but the court shall take into consideration the degree of negligence attributable to the decedent and reduce the recovery accordingly.

§ 767. Exceptions from operation of chapter

The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.
